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Supreme Court, U.S.
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In The

Supreme Court of the United States

PHILIP RANDOLPH PHILLIPS,

Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE:

Whether a Certificate of Appealability should have issued pursuant to *Slack v. McDaniel*, 529 U.S. 473 (2000) on whether the district court's application of the one-year period of limitations established by 28 U.S.C. § 2244(d) to this case deprived Petitioner of his due process rights because the State of Texas admitted error in losing the state habeas petition Petitioner filed in 1981 making it impossible for him to meet the state exhaustion requirement until he filed another petition in 2009, or, alternatively, because limitations were tolled by the pendency of the 1981 petition.

QUESTION TWO:

Whether reasonable jurists would find it, at least, debatable whether Phillips's petition stated a valid claim for resentencing in that his Fifth, Sixth, and Eighth Amendment rights were violated during the punishment phase of his trial because the jury was allowed to consider two invalid convictions that were later overturned.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the proceedings.

There is no corporation involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Philip Randolph Phillips respectfully petitions for a writ of certiorari to review the denial of a Certificate of Appealability by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit is unpublished but is reprinted here at Appendix (App.) 1-2. The Order Accepting Findings and Recommendations of the United States Magistrate is unpublished, but can be found at 2009 WL 1974302. The Findings and Recommendations of the United States Magistrate are unpublished but are reprinted here at App. 3-8.

JURISDICTION

The order of the Court of Appeals was entered on May 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

AMENDMENT V (1789)

> *No person shall . . . be deprived of life, liberty, or property, without due process of law.*

The Sixth Amendment to the United States Constitution provides in pertinent part:

AMENDMENT VI (1789)

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .*

The Eighth Amendment to the United States Constitution provides:

AMENDMENT VIII (1789)

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

AMENDMENT XIV (1868)

> **Section 1.** *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the*

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(d)(1)(B) and (2) provide:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of

. . .

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or the laws of the United States is removed, if the applicant was prevented from filing such by state action;

. . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The entire text of 28 U.S.C. §§ 2244 and 2254 is reprinted at App. 9-16.

STATEMENT OF THE CASE

Philip Randolph Phillips, I.D. #274498, is in state custody in Texas serving two life sentences pursuant to the judgment and sentence of the 195th Judicial Court of Dallas County entered on October 19, 1977.[1] On June 15, 2009, Phillips filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 to challenge these state court convictions. On July 7, 2009, the district court denied that Petition. The district court denied Phillips's Application for Certificate of Appealability on October 22, 2009. The Fifth Circuit Court of Appeals denied Phillips's Motion for a Certificate of Appealability on May 18, 2010, finding that he had not met the standard set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), without further explanation.

Phillips was indicted and convicted in the 195th District Court of Dallas County, Texas on four offenses (two counts of aggravated kidnapping and two counts of sexual abuse) against two different victims. All four offenses arose from the same transaction. Judgment was entered on October 19, 1977. Phillips was sentenced by the jury to life for the aggravated

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[1] Phillips has also served approximately twenty-one calendar years of a twenty-five year sentence on a separate conviction from Harris County, and has many more years of time credit on that conviction for good conduct while in prison. Any reduction in sentencing on the instant charges, if a new sentencing trial were granted, would result either in outright release from prison or, at a minimum, would be a favorable consideration in parole.

kidnapping convictions and to 20 years for the sexual abuse convictions. *See Phillips v. State*, 597 S.W.2d 929, 937-38 (Tex. Crim. App. 1980).

Phillips appealed to the Texas Court of Criminal Appeals. That Court applied the Texas "carving doctrine" and reversed the two convictions for sexual abuse, but affirmed the two convictions for aggravated kidnapping on May 14, 1980. *Id.*

Petitioner filed his initial state court application for writ of habeas corpus challenging use of these two convictions with the state district court on May 15, 1981. ROA 64. Before July 16, 2009, he had never been notified that this application was forwarded to the Texas Court of Criminal Appeals and denied on November 25, 1981. RE 22-25, 28; ROA 60-3, 83. Until a state application for writ of habeas corpus is considered and ruled upon by the Texas Court of Criminal Appeals, Petitioner has failed to exhaust his state remedies and is precluded from filing any federal writ application. 28 U.S.C. § 2254.

As explained in Chief Deputy Clerk Abel Acosta's affidavit, because of defects in the filing and computer system of the Court of Criminal Appeals, Petitioner was not notified of the receipt and denial of his first state habeas corpus writ application until July 16, 2009. RE 28-31; ROA 83-86.

Acosta had previously denied that the Texas Court of Criminal Appeals had ever ruled upon his state writ application. ROA 83-86, 158-59. Prior to the discovery of this computer problem, Phillips filed

his second Application for Writ of Habeas Corpus on March 6, 2009, in the 195th Judicial District Court, Dallas County, Texas, which was forwarded to the Texas Court of Criminal Appeals and denied on May 6, 2009. ROA 6. Phillips then filed his federal petition on June 15, 2009. ROA 4. The district court referred the petition to a Magistrate Judge who on June 16, 2009, entered Findings, Conclusions, and Recommendation that the request for habeas corpus relief be denied with prejudice as barred by the statute of limitations, citing 28 U.S.C. § 2244(d)(1). RE 18-21; ROA 48-51.

Phillips objected on July 2, 2009. ROA 53-76. On July 7, 2009, the district court accepted the Magistrate's Recommendation and denied Phillips's Petition for Writ of Habeas Corpus. RE 15-16; ROA 77-78. Phillips filed a Motion for New Trial on July 20, 2009, bringing to the court's attention the new evidence that had been discovered indicating that the clerk of the Court of Criminal Appeals had no record that Petitioner's May 15, 1981 petition had been denied and that Phillips could never have been notified of the denial. ROA 79-124. This motion was denied by the court on September 16, 2009.

If the June 15, 2009 petition is treated as a continuation of Phillips's 1981 efforts to obtain habeas relief, then it should be governed by federal habeas law as it existed prior to the adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244. *Lindh v. Murphy*, 521 U.S. 320, 326-36 (1997). On the other hand, if the

AEDPA applies, it expressly and unequivocally provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending *shall not be counted toward any period of limitation under this subsection.*" 28 U.S.C. § 2244(d)(2) (emphasis added). Therefore, the district court committed error in dismissing Petitioner's June 2009 petition as barred by the statute of limitations.

Petitioner was diligent in pursuing his habeas action, and it was logical for him to assume, from the known facts, that his May 15, 1981 petition was for whatever reason still pending. He could not have filed a federal habeas corpus application because the state courts were erroneously denying that he had exhausted his state remedies. His June 2009 petition was filed within the period when limitations were tolled and should not be barred. The mistakes of the state court system constituted an impediment to the filing of the federal application within the meaning of 28 U.S.C. § 2244(d)(1)(B), and constituted a rare and exceptional circumstance that should toll the application of the limitations period.

On the merits, Petitioner has made a substantial showing that his Fifth Amendment due process rights and his Eighth Amendment right to be free from cruel and unusual punishment may have been violated because the sentencing jury believed that petitioner was guilty of four offenses when he could only be legally convicted of two offenses. If a defendant is not tried separately for separate charges, he is deprived

of his Sixth Amendment right to an impartial jury. The Texas carving doctrine was designed to avoid such prejudice and to ensure that criminal defendants receive an impartial jury as required by due process of law.

REASONS FOR GRANTING THE PETITION

I. The Court Below Decided an Important Question of Law in a Manner Contrary to this Court's Precedent.

This Court has recently held in *Jimenez v. Quarterman*, ___ U.S. ___, 129 S.Ct. 681 (2009), that "where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal." *Jimenez* at 686 n.4.

Phillips filed a state writ on May 15, 1981, but was told on January 27, 2009, that there was no record of this petition in the records of the Texas Court of Criminal Appeals ("TCCA"). In frustration, to exhaust his state remedies, Phillips filed a second Texas application in the convicting court on March 6, 2009, which was denied by the TCCA on May 6, 2009. The state courts did not reject his petition as a successive writ or even note that he had filed a previous writ. Petitioner was not told until July 17, 2009, that court records showed that the first petition was, in fact, denied on November 25, 1981.

According to the TCCA Clerk's affidavit, had Phillips inquired about the status of his first petition between April, 1996, and July, 2009, he would not have been able to determine that it had been docketed. ROA 83-84.

Phillips's federal habeas application was filed on June 15, 2009. The federal district court ignored the pendency of the 1981 state petition in determining that limitations barred Phillips's application.

Because Phillips has never had a post-conviction hearing, there is no evidence in the record regarding whether Phillips used the due diligence required by the Fifth Circuit in determining the status of his first habeas petition. *Stroman v. Thaler*, 603 F.3d 299 (5th Cir. 2010).

This Court recently noted that the relevant state court judgment for purposes of review under AEDPA is the judgment adjudicating the merits of the petitioner's state habeas application. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 238 (2007). Here the TCCA adopted the findings of the trial court without hearing. Those findings make no mention of a statute of limitations issue, much less the evidentiary matters inherent therein. The federal district court held no hearing, but denied the federal petition for failure to file within the statutory limitations period.

By analogy to *Jimenez*, the state court's consideration and ruling on Phillips's 2009 writ application without consideration of its timeliness restarts the timeline under § 2244(d)(1)(A).

Additionally, the procedure followed by the lower courts is contrary to the Fifth Circuit's decision in *Stroman* because the facts determined to be dispositive in *Stroman* in deciding if a party has shown diligence in inquiring about the status of a state habeas petition have never been established in this case.

II. This Case is an Appropriate Vehicle for this Court to Balance the Lower Court's Application of the Antiterrorism and Effective Death Penalty Act's Limitations Provisions § 2244(d)(1)(A) to Conform to Equitable Principles.

In *Lonchar v. Thomas*, 517 U.S. 314 (1996), this Court recounted the history of the writ of habeas corpus characterizing it as the "highest safeguard of liberty." *Id.* at 322 (citing *Smith v. Bennett*, 365 U.S. 708, 712 (1961). *Lonchar*'s appendix lists the various bills considered by Congress in the ten years before the decision which unsuccessfully proposed a statute of limitations for habeas relief. Congress's enactment of the AEDPA heightens the need to balance the court's freedom to issue the writ against the State's interest in the "finality" of its own legal process recogized in *Lonchar*. *Id.*

The AEDPA limitation period is severe and departs significantly from the previous rules for habeas petitions. *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir. 1998). In recognition, the Act itself provides that the one-year statute of limitations is tolled while

a properly filed state application is pending and creates an exception to the application of the limitations period where the state imposes an unconstitutional impediment to the filing of a petition. Additionally, if this Court recognizes a new constitutional right that is given retroactive effect, limitations is tolled; and, if the petitioner untimely discovers after the exercise of due diligence, a factual predicate necessary to his petition, limitation is tolled. 28 U.S.C. §§ 2244(d)(1) and (2). Lower courts have also found it necessary to apply a reasonableness standard to the retroactive application of the limitations period of the AEDPA and have recognized that in certain instances equitable tolling should apply. *Fields v. Johnson*, 159 F.3d 914, 915-16 (5th Cir. 1998). The Fifth Circuit has recognized that equitable tolling may apply where a petition falls outside the limitations period because the petitioner did not receive notice of the denial of his appeal. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (rehearing granted in part for technical correction, 223 F.3d 797 (2000)).

In our case Phillips filed his first habeas petition in state district court on May 15, 1981, before the AEDPA was enacted. ROA 64. That petition was forwarded to the TCCA and denied on November 25, 1981. RE 22-25, 28; ROA 60-3, 83. However, Phillips was not notified that his petition was forwarded to the TCCA let alone denied until July 16, 2009. RE 28-31; ROA 83-86. Before this notification Phillips filed another Application for Writ of Habeas Corpus in state court on March 6, 2009. ROA 6. His federal

petition was filed on June 15, 2009. If this petition is a continuation of his 1981 efforts to obtain habeas relief, it is governed by pre-AEDPA rules. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

If it is governed by the AEDPA, then, under these facts, the tolling of the limitations period while a properly filed application is pending in state court should operate to toll Phillips's limitation period until July 16, 2009. 28 U.S.C. § 2244(d)(2). Alternatively, the limitations period should be tolled because the state created an impediment to the filing of Phillips's federal petition. Further, equitable tolling should apply because Phillips did not receive notice that his first petition had been denied. This Court should consider our factual situation and clarify the law that should be applied.

III. If this Court Denies this Petition the State Court's Decision on Phillips's Substantive Constitutional Issue will Never be Reviewed by a Federal Court.

Despite Phillips's good faith efforts and diligence in bringing the constitutional error inherent in his sentencing before a federal forum the district court's erroneous application of the limitations period of the AEDPA forecloses any federal review.

The Texas "carving doctrine," recognized at the time of Phillips's conviction, prohibited multiple

prosecutions for offenses arising out of a single transaction.[2]

> [T]he [carving] doctrine was recognized as 'allowing the prosecution to carve as large an offense out of a single transaction as he can, yet he must cut only once.'

Phillips, 597 S.W.2d at 937 (citing *Simco v. State*, 9 Tex. App. 338, 349 (1880)).

Phillips was denied an impartial jury and due process of law when he was forced to defend against four felonies rather than two. The trial court's erroneous ruling on the carving doctrine issue forced Phillips to defend against four felonies when he legally could be convicted of only two. On direct appeal, the TCCA agreed that the Texas carving doctrine had been violated. *Phillips*, 597 S.W.2d at 937-38. It dismissed the two convictions for sexual abuse, but it did not consider the prejudicial effect during the sentencing phase of the trial court allowing the jury to consider four convictions rather than two.

Phillips offered expert testimony that it is more probable than not, that he was harmed at the

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[2] While in effect, the Texas courts used the carving doctrine to protect a person's Fifth Amendment right under the U.S. Constitution against facing double jeopardy. *Ex Parte McWilliams*, 634 S.W.2d 815, 823-24 (Tex. Crim. App. 1980). It was abandoned for the more traditional Fifth Amendment analysis in 1982. *Id. See also Clay v. Lynaugh*, 849 F.2d 908 (5th Cir. 1988); *Clay v. Lynaugh*, 770 S.W.2d 800 (Tex. Crim. App. 1989).

sentencing phase by the jury's incorrect belief that he had committed four, rather than two, legally prosecutable felony offenses. *See* RE 32-35 (Affidavit of Robert C. Hinton, Jr.); ROA 148-52. Mr. Hinton's testimony establishes that reasonable jurists could debate whether Petitioner's constitutional rights were violated when the jury considered four felonies during the sentencing phase of his trial.

The right to be tried separately for separate charges is well recognized. *Ex Parte Quintanilla*, 207 S.W.2d 377, 378 (Tex. Crim. App. 1948). The Texas Court in *Quintanilla* stated, "we think that the trial of all four separate cases before the same jury at the same time over relator's objection deprived him of the valuable right of trial before an impartial jury in contravention of [the Constitution]." *Id.* The *Quintanilla* prejudicial effect is applicable to Phillips since he had to defend against twice as many felony charges as he could be legally charged with.

In the state habeas corpus proceedings, the sole argument of the state to excuse the error at the punishment phase was adopted by the state convicting court in its Findings of Fact and Conclusions of Law: *i.e.*, that the jury based its sentence on the facts of the case, not the number of convictions. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (disapproving of a state court's adoption of conclusory statements prepared by the prevailing party). This "defense," such as it is, is wholly conclusionary and without any basis in reason or precedent. Further, it

ignores that one of the chief facts before the jury was Phillips's conviction for four felonies.

In *Cone v. Bell*, this Court rejected the same argument with regard to the punishment assessed at trial, holding that the analysis of potential harm with respect to sentencing is completely different from the analysis of potential harm with respect to guilt. *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1784 (2009).

Like the Sixth Circuit in the *Cone* case, the Texas Court of Criminal Appeals on Phillips's direct appeal did not address the prejudicial effect the violation had on sentencing. In the absence of that examination, the violation of Phillips's due process rights was not fully remedied by the reversal of two of the four convictions.

Federal law also recognizes the theory behind the carving doctrine by precluding "multiplicity:"

> The law protects an individual against multiplicitous indictments to avoid multiple sentences for a single offense and to eliminate the prejudice which such indictments may generate in the eyes of a jury. [Internal citation omitted]. For when an indictment charges numerous offenses arising from the same conduct it 'may falsely suggest to a jury that a defendant has committed not one but several crimes.'

United States v. Clarridge, 811 F.Supp. 697, 702 (D.D.C. 1992) (citing *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988)).

Likewise, in *United States v. Carter*, 576 F.2d 1061, 1064 (3rd Cir. 1978), the court held:

> Multiplicity, the charging of a single offense in different counts of an indictment, has the vice that it may lead to multiple sentences for a single violation. And even if that does not result, it may prejudice the jury against the defendant by creating the impression of more criminal activity on his part than in fact may have been present.

According to a noted commentator, "The vice of multiplicity is that it may lead to multiple sentences for the same offense . . . and . . . may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." 1A Charles Alan Wright et al., *Federal Practice and Procedure* § 142 at 17 (2d ed. 1999). Such error results in a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

In Phillips's case, the trial court led the jury to believe that his conduct constituted four separate felonies. By overstating the number of felonies, the trial court conveyed to the jury that Phillips's conduct was more severely sanctionable than the law allows. Trial on four rather than two felonies was harmful to Phillips at the sentencing phase.

The state's only argument and the trial court's only basis for rejecting Phillips's state habeas corpus application is the conclusionary fiat that the

punishment may be justified based on the facts of the case. This argument conflicts with Supreme Court law and other precedent discussed above. Further, the argument proves too much; if it were valid, then any error at the punishment phase could be shrugged off. *None* of the case law cited above has adopted such a standard. Petitioner has made a substantial showing that his Fifth Amendment rights to due process, Sixth Amendment right to an impartial jury, and his Eighth Amendment right to be free of cruel and unusual punishment may have been violated.

The TCCA denied Phillips's 1981 Application for Writ without written order on the findings of the trial court. RE 30; ROA 85. The TCCA similarly denied Phillips's 2009 Application for Writ without written order. The federal district court and the Fifth Circuit denied Phillips's 2009 Application for Writ on limitations and never reviewed the constitutional issue raised. RE 17-21; ROA 48-51.

The constitutional issue raised by the facts of Phillips's sentencing state a valid claim of the denial of a constitutional right and deserves review on the merits. On balance, the important liberty interests protected by the writ of habeas corpus should not be summarily set aside for dubious procedural reasons. *Lonchar*, 517 U.S. at 324. The state's own errors in preventing Petitioner from filing a federal habeas application should not deprive him of his day in court.

CONCLUSION

Jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Petitioner respectfully prays that the Court grant this Petition so that justice may be served.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-11041
USDC No. 3:09-CV-1131

PHILIP RANDOLPH PHILLIPS,

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

(Filed May 18, 2010)

ORDER:

Philip Randolph Phillips is serving a life sentence that was imposed after a jury found him guilty of two counts of aggravated kidnaping. This court is now presented with his request for a certificate of appealability (COA) to challenge the district court's determination that his 28 U.S.C. § 2254 habeas corpus petition was untimely and its concomitant denial of that petition. According to Phillips, he is

entitled to both statutory tolling under 28 U.S.C. § 2244(d)(1)(B) and equitable tolling due to defects in the records system of the Texas Court of Criminal Appeals that prevented him from learning of the denial of his first application for state habeas relief. He also maintains that his sentence was constitutionally infirm because the jury chose it after considering evidence pertaining to two convictions that were later overturned.

When the district court's denial of federal habeas relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Phillips has not met this standard. Consequently, his motion for a COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP RANDOLPH PHILLIPS, ID #274498, Petitioner,	)	
vs.	)	No. 3:09-CV-1131-B (BH)
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	)	Referred to U.S. Magistrate Judge

FINDINGS, CONCLUSIONS, AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of the Court, this action has been referred to the United States Magistrate Judge for findings, conclusions, and recommendation.

I. BACKGROUND

Petitioner, an inmate currently incarcerated in Texas Department of Criminal Justice – Correctional Institutions Division ("TDCJ-CID"), filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his Dallas County convictions in Cause Nos. F77-6984-KN and F77-6985-KN for aggravated

kidnaping. Respondent is Nathaniel Quarterman, Director of TDCJ-CID.

Petitioner was convicted in Cause Nos. F77-6984-KN and F77-6985-KN on October 19, 1977, and received life sentences. (Pet. Writ of Habeas Corpus ("Pet.") at 2.) The court of appeals affirmed the convictions on March 26, 1980, and petitioner filed no petition for discretionary review ("PDR"). (*Id.*) On March 6, 2009, he filed a state habeas application for writ of habeas corpus for each conviction, and both were denied on May 6, 2009. (*Id.* at 3.)

On June 15, 2009, petitioner filed this federal petition through counsel. (*Id.* at 1.) He claims that although he successfully challenged two cases of sexual abuse on direct appeal, the appellate decision did not cure a due process violation caused by petitioner standing trial before a jury on four alleged crimes instead of two. (*Id.* at 5.)

II. STATUTE OF LIMITATIONS

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Because petitioner filed the instant petition after its effective date, the Act applies to his petition.

Title I of the Act substantially changed the way federal courts handle habeas corpus actions. One of the major changes is a one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). The one-year period is calculated from the latest of either (A) the date on which the judgment of conviction became final; (B) the date on which an impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which the Supreme Court initially recognizes a new constitutional right and makes the right retroactively applicable to cases on collateral review; or (D) the date on which the facts supporting the claim became known or could have become known through the exercise of due diligence. *See id.* § 2244(d)(1)(A)-(D).

Petitioner has alleged no state-created impediment under subparagraph (B) that prevented him from filing his federal petition. Nor does he base his petition on any new constitutional right under subparagraph (C). Thus, as § 2244(d)(1) relates to this case, the Court will calculate the one-year statute of limitations from the latest of (A) the date petitioner's conviction became final or (D) the date on which he knew or should have known with the exercise of due diligence the facts supporting his claims.

In this case, petitioner appealed his convictions but filed no PDR. The state convictions therefore became final for purposes of § 2244(d) upon the expiration of the time for seeking further review through

the filing of a PDR. *See Roberts v. Cockrell*, 319 F.3d 690, 692 (5th Cir. 2003) (rejecting reliance upon the date of mandate and relying on Tex. R. App. P. 68.2 for the thirty day period to file a PDR). Petitioner's convictions became final shortly after his convictions were affirmed on appeal in 1980.[1] When a conviction becomes final before the April 24, 1996 enactment of the AEDPA, the petitioner has one year following the effective date of the Act in which to file a federal petition for a writ of habeas corpus. *Williams v. Cain*, 217 F.3d 303, 304 n.1 (5th Cir. 2000). "[W]hen computing the one year time period applicable to petitions raising claims that would otherwise be time-barred as of . . . April 24, 1996, that date must be excluded from the computation and petitions filed on or before April 24, 1997 are timely." *Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998). The one-year period of limitations does not apply prior to its effective date. Thus, no time may be counted against an inmate prior to April 24, 1996, the date the AEDPA was signed into law. Petitioner is entitled to the one-year grace period which would end, in the absence of tolling, on April 24, 1997.

With regard to subparagraph (D), the Court determines that the facts supporting the claim raised in this federal petition also became known or could have become known prior to the date petitioner's

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[1] Given AEDPA's grace period discussed *infra*, there is no need to pinpoint the exact day or month.

grace period expired on April 24, 1997. He challenges two 1977 convictions. Through the exercise of due diligence he should have learned the factual basis for his claim well before the grace period expired.

Because petitioner filed his petition more than one year after his grace period expired in April 1997, a literal application of § 2244(d)(1) renders his June 2009 filing untimely.

III. TOLLING

The AEDPA expressly and unequivocally provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending *shall not be counted toward any period of limitation under this subsection*." 28 U.S.C. § 2244(d)(2) (emphasis added). Thus, the clear language of § 2244(d)(2) mandates that petitioner's time calculation be tolled during the period in which his state habeas application was pending before the Texas state courts. *See also Henderson v. Johnson*, 1 F. Supp. 2d 650, 652 (N.D. Tex. 1998) (holding that the filing of a state habeas application stops the one-year period until ruling on state application).

When petitioner filed his state petition in March 2009, the statutory limitations and grace period had already long expired. Accordingly, the statutory tolling provision does not save petitioner's June 2009 federal petition. Further, nothing in the petition indicates that rare and exceptional circumstances

warrant equitable tolling. *See Scott v. Johnson,* 227 F.3d 260, 263 (5th Cir. 2000) (recognizing that statute of limitations is subject to equitable tolling).

IV. RECOMMENDATION

The Court should find the request for habeas corpus relief brought pursuant to 28 U.S.C. § 2254 barred by statute of limitations and DENY it with prejudice.

SIGNED this 16th day of June, 2009.

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES
MAGISTRATE JUDGE

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the

evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable

and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding In the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State,

through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of in digency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such

pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.